

State of New Mexico
CHILDREN, YOUTH AND FAMILIES DEPARTMENT

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Submitted Electronically to adoptionregs@state.gov

And sent by overnight courier to:

United States Department of State
CA/OCS/PRI
Adoption Regulations Docket Room
2201 C Street, N.W.
Washington D.C. 20520

Re: Docket No. State/AR-01/96: Comments on Proposed Regulations 22 CFR Part 96;

Gentlemen:

As the Secretary of the New Mexico Children, Youth and Families Department ("the Department"), I respectfully submit the following comments by the Department on the Department of State's Proposed Regulations ("the Regulations") to implement the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions ("the Convention") and the Intercountry Adoption Act of 2000 ("the IAA").

Introduction

The stated purposes of the Convention, the IAA and the proposed regulations are to protect the children, birth parents and adoptive parents involved in intercountry adoptions and to prevent child-trafficking and other abuses. Many of the proposed regulations effectively promote these purposes. I applaud the Secretary of State and the staff who worked on these regulations for their efforts in attempting to improve the delivery of services in connection with international adoptions, a goal which the State of New Mexico deeply shares. However, the Department believes that certain provisions of the regulations need reconsideration. We are particularly concerned with provisions concerning liability, whose effects run counter to the goals of the Convention and the IAA by increasing the risks and costs of operation of adoption agencies to the point that smaller agencies may not be able to participate in international adoptions. This would operate to the ultimate detriment of prospective adoptive parents and prospective adopted children around the world.

The following comments are respectfully offered in an effort to try and improve the system which the proposed regulations are designed to enhance. We recommend that the Department of State issue an interim ruling on the Regulations, with a period for further public comment. We hope that through a thorough process of public comment and discussion among all those involved that the issues noted below will be satisfactorily resolved.

Preamble

The Proposed Regulations establish as a goal, at Preamble 54081, to give "the adoptive parents legal recourse against a single entity." As discussed below, the Proposed Regulations endeavor to accomplish this goal by imposing strict liability on primary providers of adoption services in the United States for all damages regardless of fault. This proposed scheme would discard centuries of established principles of tort and contract liability, and would have disastrous impact on the availability of the very services the Hague Convention was designed to promote. This proposed liability scheme exceeds the rule-making authority of the Department of State, in the Department's opinion, and is inconsistent with the Department of State's own expressed intention at Preamble 54077 to "ensure that the standards do not unnecessarily or adversely effect the currently sound practices of small agencies and persons...."

§ 96.4

The Department acknowledges that the IAA permits the Secretary of State ("the Secretary") to designate as few as one accrediting entity. The Department submits, however, that the most effective way to implement both the letter and the spirit of the Convention, IAA and these Regulations would be for the Department of State to enter into agreements with public agencies in each state, particular those agencies which are already engaged in the licensing and oversight of adoption agencies. A state agency, supported by public funds, can efficiently provide the necessary services at the lowest possible cost to the adoption agencies and persons who will be applying for accreditation and approval. At least in states like New Mexico, which has the structure and personnel in place to perform this function, and which is able to fulfill the requirements of the IAA and the Regulations, an agreement with a public agency to act as an accrediting entity is the best way to meet the goals of the IAA in an expeditious and cost-effective manner. This is of particular importance in smaller and less wealthy states like New Mexico, where adoption agencies are often small and lacking in the resources necessary to support a higher cost accreditation process. The proposed regulations recognize the importance of the services provided by these smaller agencies, in the Preamble, p. 54077

§ 96.10

§ 96.10 provides that the Secretary will cancel or suspend an accrediting entity's designation as such if the entity found to be substantially out of compliance with the Convention, the IAA or the accrediting agency Agreement with the Secretary of State. The Department acknowledges that the relationship between an accrediting entity and the State Department is one of contract or memorandum of agreement, and that the Administrative Procedure Act, 5 USC §§ 501 et seq., probably does not apply to these

agreements. However, the Department would suggest that the Regulations need to spell out in some detail (a) the process by which the Secretary of State will investigate complaints against, or concerns about, accrediting entities, (b) how the Secretary will determine whether accrediting entities are or are not in "substantial compliance" with the relevant laws and regulations, and (c) a process by which accrediting entities will be given notice of any complaints or concerns which may arise, so that they may have an opportunity to respond to the concerns, and to correct any deficiencies in their compliance. As currently written, the regulation appears to provide for no consideration of, or even communication with an accrediting entity with which the Secretary has a concern, nor for any opportunity for the accrediting entity to respond or engage in corrective action. This is notably inconsistent with the provisions of 42 USC § 14922, by which the IAA gives agencies or persons against whom action is taken by an accrediting entity an opportunity to respond and correct any deficiencies which have been noted.

§ 96.33(e)

§ 96.33(e) is not sufficiently clear about how (or how strictly) the requirement that every agency or person maintain a three month reserve of cash or other financial resources is to be enforced. The Regulation states that an agency should operate on a sound financial basis, which is certainly appropriate, and then says the agency should "generally" maintain three months worth of operating expense reserves. The Department does not disagree with this notion as a general reference point for assessing an agency's or person's financial soundness, but suggests that this Regulation should be clarified to make clear that an agency or person will not be considered out of compliance with its obligations if it simply falls below the suggested three month reserve amount for a brief period of time, or if other aspects of its financial situation make application of the three month reserve requirement unnecessary or inappropriate. For example, there might be small agencies which do little enough business, or agencies who have assets in the form of accounts receivable from government agencies, that a three month cash reserve requirement would be unnecessarily strict.

§ § 96.33(g) and (h)

§ 96.33(g) requires that an agency or person use an "independent professional assessment of its risks... as the basis for determining the type and amount of ... liability insurance to carry." The regulations do not define what constitutes an "independent professional assessment." Such a definition would seem necessary to enforcement of this requirement. In addition, while § 96.33(g) calls for agencies and persons to determine their liability coverage by an assessment of their actual risks, § 96.33(h) goes on to require that every agency and person carry liability insurance in an amount of no less than \$1,000,000 per occurrence, regardless of the actual risks as assessed. These two provisions seem inconsistent with one another, and § 96.33(h) seems unnecessarily strict without data to support it. The IAA, § 14923(b)(1)(E) calls for each agency to agree to have in force "adequate liability insurance." The Secretary's designation of a specific minimum amount of insurance would appear to exceed the requirements of the IAA, and thus exceed the authority of the Secretary of State to make regulations pursuant to the IAA. Furthermore, § 96.33(h) effectively renders irrelevant the Secretary's own Regulation § 96.33(g), which calls for an assessment of actual risks in determining the extent of liability coverage needed, at least for small

agencies for which minimum liability coverage of \$1 million per occurrence seems clearly excessive. The Department suggests that § 96.33(h) be deleted, and replaced by language indicating that the risk assessment and resulting insurance coverage under § 96.33(g) shall be subject to the approval of the accrediting entity as to the sufficiency of the amount of insurance coverage carried by each agency or person. In addition, the Department notes that obtaining the kind and level of liability coverage required by the Proposed regulations could well be impossible or prohibitively expensive under proposed § 96.45 and § 96.46 as proposed, establishing a system of strict liability which it is unlikely any insurance company would be willing to insure against, at least at any but prohibitively high cost.

§ 96.37(d) and (f)

§ 96.37(d) requires a masters degree or higher graduate degree for agency social work supervisors, but permits agency social work supervisors to qualify by substituting "incumbent" skills and experience in place of a master's degree in the relevant field. The Department notes that these provisions are similar New Mexico's current licensing laws and regulations, which include "grandfather" provisions. The Department would suggest, however, that § 96.37(d) specifically permit social work supervisors to be qualified under the Hague/IAA regulations if they are licensed in a relevant field under State law, including grandfather provisions. Determination of what qualifications are necessary to ensure adequate provision of services and supervision would seem to us to be a matter best left to State law.

The Department recommends the same change to proposed § 96.37(f), which for unexplained reasons does not presently include the "incumbent" language found in § 96.37(d). The Department sees no reason for such a distinction between the requirements for social work supervisors and persons conducting home studies. Indeed, it would seem that if either job called for a higher level of credentials it would be the "supervisor." The Department suggests that state licensing laws are sufficient to guarantee that individuals serving as social work supervisors or performing home studies will have sufficient credentials upon which to base confidence in their work. See Preamble, p. 54069. This is of particular importance in less populated and less wealthy states, where the available pool of people to do this important work is often relatively small.

§ 96.39(d)

§ 96.39(d) prohibits "blanket waivers" in agreements between agencies and prospective adoptive parents. As discussed below in the context of liability provisions, the Department agrees that agencies bear responsibility for fulfilling their duties under the IAA and regulations, and agrees that no waiver of these responsibilities should be permitted. On the other hand, as discussed below, agencies should not bear liability for matters beyond their ability to control. Liability for intentional or negligent failure to fulfill an agency's duties exists under present law. These regulations should not extend liability beyond that imposed by the courts and statutes of the United States under tort and contract law. There are risks involved in intercountry adoptions which are beyond the control of United States adoption agencies, and these regulations should not prohibit appropriate language in adoption agreements which inform prospective adoptive parents that there are such risks and that the agency assumes responsibility

only for its own good faith compliance with applicable laws and regulations. See, e.g., *Ferenc v. World Child, Inc.*, 977 F.Supp. 56 (D.D.C. 1997).

§ 96.45(b)(8) and (c) and § 96.46 (b)(9) and (c)

As noted above, the Preamble establishes a promise of attempting to minimize negative impact on the "currently sound practices of small agencies and persons," but then proceeds to establish a system of strict liability which virtually guarantees that many agencies and persons, particularly smaller adoption agencies, will be forced out of the business due to excessive cost and risk.

§ 96.45(b)(8) and (c) and § 96.46 (b)(9) and (c) purport to establish strict liability for all damages on the part of U.S. adoption agencies, a matter which creates serious concerns for the Children, Youth and Families Department of New Mexico. We believe these proposed regulation provisions impose unnecessary, excessive and unauthorized liability and costs upon adoption agencies, beyond the liability normally imposed by tort and contract law, and beyond the ability of small agencies to bear. The ultimate result of a strict liability system (for which liability insurance is unlikely to be available), will be to drive small providers out of the field, increasing costs to prospective adoptive parents and chilling the entire process by which international adoptions are arranged and completed.

§ 96.45(b)(8) and (c) and § 96.46(b)(9) and (c) create strict liability on the part of primary providers for any and all damages which might result from the acts of all persons, agencies, individuals or entities (other than public government entities) with which the primary provider deals in the course of arranging a Convention adoption. This provision is highly problematic, and would appear to be beyond the regulatory power of the Department of State.

1. The IAA does not establish or authorize specific standards for provider liability under contract, tort or civil law. Civil liability for the acts of agents is a matter which has developed in the courts, and to some extent through legislation, over very long period of time. It does not appear to be within the authority of the Secretary of State, under its regulatory authority pursuant to the IAA, to establish rules of civil liability in tort or contract, which rules would purport to replace existing statutory and caselaw in this complex area of law. This is an area reserved to the legislature and to the courts under the United States Constitution, and which is not expressly delegated to the Department of State by the IAA. See, e.g., *Chambers v. St. Mary's School*, 82 Ohio St. 3d 563, 697 N.E.2d 198 (S.Ct.Ohio 1998).

2. These provisions establish what amounts to strict liability for damages which did not result from any act of negligence or bad faith by the primary provider. This is nowhere suggested as a goal or even an option by the IAA. The Department of State Summary and introduction to the proposed regulations notes that §§ 96.45 and 96.46 are designed to ensure each primary provider is "responsible for ensuring that the supervised providers with whom it chooses to work comply with [the] requirements" of the Regulations. (Preamble p. 54083) This is a laudable goal, which the Department agrees with. The Department understands that this stated goal is engendered by concerns over past failures to meet performance standards on the part of some supervised providers, particularly those in foreign countries. But there is a major

difference between requiring primary providers in the U.S. to exercise due diligence and do everything they can to obtain complete and accurate information and secure compliance with Hague requirements in intercountry adoptions, and making such U.S. agencies strictly liable for damages resulting from matters over which they have no possible control. The Department of State's own introduction to the proposed regulations notes that it is necessary to exclude foreign government entities from any vicarious liability provision "because the primary provider has no control over these entities." (Preamble, p. 54083) For the same reason, it is unrealistic to create a legal presumption that primary providers have complete control over all their supervised providers under all circumstances, particularly those in foreign countries. As an example: private providers in some foreign countries could be subject at any time to restrictions or obstacles to adoptions imposed by the governments of the countries in which they are located. Such restrictions could prevent a foreign provider from delivering on what was promised, through no fault of the provider. Many eventualities are matters over which the primary U.S. provider simply has no control. It is inappropriate, practically and as a matter of law, to presume that a primary provider will always be liable for damages caused by the actions or inactions of supervised providers. Existing law takes issues of fault and duty into consideration in distributing liability. There is no principled basis on which the Department of State should do otherwise.

3. Under existing tort and contract principles, established by common law, case law and statute over literally hundreds of years, liability for a person's negligence or for failure to fulfill a person's legal duty may be established by evidence in a court of law. Liability for one's agents is subject to the same scrutiny in court. See, e.g. *Ferenc v. World Child, Inc.*, 977 F.Supp. 56 (D.D.C., 1997). A primary provider of adoption services in the United States is certainly potentially liable in a court of law for willfully or negligently failing to exercise the supervisory and other duties imposed on it by these Regulations. But to add to this existing liability a strict liability regulatory provision, covering all damages caused by supervised providers even where there is no showing of fault or bad faith by the primary provider, is unnecessary, unreasonable, and would appear to us to be beyond the legal authority of the Secretary of State under the IAA. Such liability is beyond the resources of small agencies to bear, and it seems unlikely that any insurance company will underwrite the risk of strict liability for all damages regardless of fault (at least not at a price any small agency could afford). The impact of this will be that international adoptions will be left to large national companies who can afford to self-insure, and whose prices to consumers will almost certainly be higher than those which could be offered by small local agencies. This proposed regulation can only discourage the diversity and number of providers of international adoption services in the U.S., inevitably increasing costs to prospective adoptive parents. This is not the result contemplated or sought by the letter or the spirit of the IAA. The Department strongly urges the Secretary to reconsider proposed Regulations § 96.45(b)(8) and (c) and § 96.46(b)(9) and (c), and replace them with a provision that primary providers must be keenly aware of their responsibility for ensuring compliance with the Convention, the IAA and the Regulations by all their supervised providers, including those in foreign countries, and must be aware that they bear potential legal liability in court (as well as regulatory discipline) for any willful or negligent failure to do so.

4. In addition to the legal and Constitutional problems with the liability imposed by §§ 96.45 and 96.46, the Secretary should reconsider these proposed regulations on

the basis of their negative practical consequences. If adoption agencies and persons performing adoption services were required to assume strict liability for the acts of all supervised providers, most small adoption service providers would simply have to stay out of this business. The extent and magnitude of the potential liability created by these regulations is beyond the capacity of small providers to absorb or risk, and insurance for such strict liability, on an international basis, is unlikely to be found at all, or at least not at a cost any small agency could afford. This problem is not cured by § 96.46(d), which allows primary providers to seek indemnification from foreign supervised providers, because the time and expense involved in attempting to do that would be prohibitive to all but the largest, national-level providers. These regulations would appear to favor large national providers, who can afford the risk, self-insurance or extremely expensive insurance coverage involved. This is not only unfair, it would have a significant economic impact on prospective adoptive parents, especially in smaller, poorer states. Small local agencies can often best and most inexpensively serve the needs of prospective adoptive parents in these states, including New Mexico.

§ 96.10

As summarized in the preamble at 54087, under § 96.10 "If an agency or person is challenging the imposition of a suspension, corrective action, or other sanction by an accrediting entity in Federal court, it has no avenue for reversing such action other than review by a United States district court, which must review any challenged adverse actions in accordance with the APA, 5 U.S.C. 706. For purposes of judicial review, the accrediting entity will be treated as a Federal agency as defined in 5 U.S.C." We recognize that this provision is in the IAA, but the State Department might want to consider amplifying on the meaning and application of this provision, because the ability and willingness of the New Mexico Children, Youth and Families Department, and, we believe, other private and State entities, to serve as accrediting entities under the IAA will be seriously impacted by this provision, especially in the context of accrediting agencies which in turn are expected to assume strict liability for all damages as discussed above.

Summary

As stated above, the foregoing comments are offered respectfully and in a spirit of cooperation with the efforts of the Department of State to implement the goals of the Convention and the IAA. The changes suggested above are necessary, we believe, to ensure that international adoptions are available to prospective adoptive parents in America and that children around the world receive the maximum benefit of that availability. Thank you for your consideration.

Sincerely,

Mary-Dale Bolson, Ph.D.
Cabinet Secretary
New Mexico Children, Youth and Families Department